LEXIS

(1)

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MICHAEL J. LAVERY,

Petitioner,

v.

CITY OF LAGUNA BEACH; LAGUNA BEACH POLICE DEPARTMENT; KENNETH FRANK, in his official capacity as City Manager and as an individual; OFFICER DEBRA CANTRELLA, in her official capacity and as an individual; SARGEANT GREG BARTZ, in his official capacity and as an individual; and DOES 1-10, inclusive,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the making, display, and sale of artwork in public parks fully protected First Amendment speech, which cannot be effectively prohibited nor more heavily burdened than other non-First Amendment protected activity taking place in public parks?

Is an ordinance that explicitly regulates and burdens individuals and non-profit organizations engaged in protected First Amendment activities in public parks, to wit, those engaged in "constitutionally protected expressive activities involving the use of structures ... by an individual or organization", "art and craft shows ... which shall be sponsored by a nonprofit organization", and "outdoor gatherings, concerts, festivals, art shows and exhibitions", with an application and permit requirement a prior restraint on such speech that must be subjected to exacting First Amendment scrutiny?

Is it possible for a law that explicitly burdens First Amendment protected activity to be vague as applied to one person because "persons of ordinary intelligence would not know whether placing one piece of art against a tree constitutes an art show or exhibition", but not be void for vagueness on its face?

Is an ordinance that singles out those engaged in "constitutionally protected expressive activities involving the use of structures ... by an individual or organization", "art and craft shows ... which shall be sponsored by a nonprofit organization", and "outdoor gatherings, concerts, festivals, art shows and exhibitions" for more burdensome and differential treatment than those engaged in non-First Amendment protected activities in public parks content-based

and therefore subject to exacting scrutiny because it (1) subjects one form of protected activity to greater regulation than another, and (2) creates speaker-based discrimination because it treats individual speakers differently and more restrictively from non-profit organizations even though they are engaged in the same type of protected activity?

Is an ordinance regulating and licensing First Amendment protected activity that is neither narrowly tailored nor leaves open any ample alternative channels of communication constitutionally infirm?

Can individual defendants who arrested Petitioner at their discretion under a vague ordinance in violation of the clearly established First Amendment right to display or sell artwork in a public forum be nonetheless entitled to qualified immunity?

Is Laguna Beach Municipal Code Chapter 18.28 unconstitutional either on its face or as applied to Petitioner?

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioner MICHAEL J. LAVERY, an individual.

Respondents are the CITY OF LAGUNA BEACH; LAGUNA BEACH POLICE DEPARTMENT; KENNETH FRANK, in his official capacity as City Manager and as an individual; OFFICER DEBRA CANTRELLA, in her official capacity and as an individual; SARGEANT GREG BARTZ, in his official capacity and as an individual; and DOES 1-10, inclusive, each of whom were the Defendants and Appellees in the courts below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks certiorari to review the Amended Memorandum by the Ninth Circuit Court of Appeals entered on May 20, 2003 [Appendix A], which Memorandum amended that entered on April 10, 2003 [Appendix C], after submission of a Petition for Rehearing and Request for Rehearing En Banc, which were denied by Order of May 20, 2003 [Appendix B].

I.

CITATIONS TO OPINIONS BELOW

The Memorandum of the Ninth Circuit Court of Appeals is found at *Lavery v. City of Laguna Beach*, 64 Fed.Appx. 23, 2003 WL 21206150 (9th Cir. Cal.) (not selected for publication in the federal reporter) (May 20, 2003) (No. 02-55280) [Appendix A]. The superceded Memorandum is found at *Lavery v. City of Laguna Beach*, 66 Fed.Appx. 96, 2003 WL 1870877 (9th Cir. Cal.) (not selected for publication in the federal reporter) (April 10, 2003) (No. 02-55280) [Appendix C].

The Order denying the Petition for Rehearing and Request for Rehearing En Banc was entered on May 20, 2003. [Appendix B], and Judgment was entered against Plaintiff on July 31, 2003 [Appendix D]. The District Court's Order Granting Defendants' Motion for Summary Judgment, also unpublished, was entered January 14, 2002, in Central District of California Case No. SA-CV-00-0388-GLT [Appendix E]. The pertinent rulings appear in the attached appendices, as noted.

II.

JURISDICTIONAL STATEMENT

The District Court for the Central District of California had subject matter jurisdiction pursuant to 28 U.S.C. Section 1331, 1343(a)(3) and (4), this being an action arising under the federal constitution and laws, and under 28 U.S.C. §§ 2201 and 2202, this being an action for declaratory relief.

On May 11, 2001, the District Court for the Central District of California, Santa Ana Division, entered an Order Granting Partial Summary Judgment for Defendants. [Appendix F] On January 14, 2002, the District Court for the Central District of California, Santa Ana Division, entered its final Order Granting Defendants' Motion for Summary Judgment as to all remaining issues. [Appendix E]

Petitioners herein appealed the District Court's Order, over which the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and Federal Rules of Appellate Procedure Rules 1, 4(a), since the Order appealed from was a final order of dismissal of the entire action. The Ninth Circuit Court of Appeals entered its Memorandum affirming in part and reversing and remanding in part to the District Court on April 10, 2003. [Appendix C] After the filing of Plaintiffs/Appellants' Petition for Rehearing and Request for Rehearing En Banc, the Ninth Circuit entered an Amended Memorandum dated May 20, 2003, also affirming in part and reversing and remanding in part [Appendix A], as well as an Order denying the Petition for Rehearing, etc. on the same date [Appendix B], and Judgment was entered on July 31, 2003 [Appendix D].

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

Laguna Beach Municipal Code, Chapter 18.28, Sections 18.28.010-18.28.090:

> [See, Appendix G]

IV.

STATEMENT OF THE CASE

A. Summary of Facts

Plaintiff Michael J. Lavery ("Lavery") is an artist who has been painting in the City of Laguna Beach (the "City") since 1984. He is a *plein air* painter, which means that he paints not working from photographs or sketches but rather painting what he sees as he paints outdoors[1]. He desires to work on, display, sell, and/or solicit donations for his own paintings and/or limited edition prints in public forums within the City of Laguna Beach.

The public areas adjacent to the beaches along the Pacific Ocean, known as "Heisler Park", where Plaintiff was working on his paintings when he was ticketed, and the Boardwalk, along with City sidewalks such as Fourth Avenue, are public forums owned and controlled by Defendant City. For decades, public places in the City of Laguna Beach such as Heisler Park and the Boardwalk have been a mecca for artists and congregation places for the local community as well as tourists.

---

[1] This method, combined with the use of classic materials such as oil paints and canvas which require long periods of drying before more paint can be applied, makes necessary the painting of multiple canvasses at once. This technique is widely used and historically important, as many of the most treasured of artists, including Van Gogh, Derain, Pissaro, and Monet, used these same materials and techniques.

Laguna Beach is well known as a haven for artists, and visitors are provided with the opportunity to do far more than simply sit on the grass or sand or swim in the ocean; rather they go particularly to Laguna Beach to meander the City to view and purchase artwork of all types, art made both by those willing and able to afford to pay rents and by those who choose not to open formal galleries. Musicians as well as artists engage in their protected activities in Laguna Beach's public forums, and both serve to create a rich cultural environment within the City.

Commencing in about 1993 and continuing to the present, the Laguna Beach Police Department and the individual defendants decided to attempt to enforce Laguna Beach Municipal Code Section 18.28.050 against artists working on more than one painting in the City's public forums, threatening artists with tickets, arrest and property confiscation if they displayed any painting other than the one on which they were currently working or if they attempted to sell or receive donations for any of their work. Plaintiff Lavery had a particularly high profile because of his opposition to the construction of a major highway in Laguna Canyon, which he protested through his art, and similar protests against the City's Challenged Laws.

During the year prior to the filing of the instant action, Plaintiff Lavery was repeatedly threatened with tickets and/or arrest under Laguna Beach Municipal Code Sections 18.28.010, 18.28.015, and 18.28.050 if he did any of the following, non-inclusive:

(a) worked simultaneously on more than one painting at a time (plaintiff is unusually ambidextrous and has regularly worked on two paintings at the same time);

(b) displayed a painting other than the one he was working on, even if the second or third painting was still drying in between applications of paint;

(c) displayed any finished work not for sale;

(d) displayed any finished work that Plaintiff intended to sell at some point in the future, even if it had no price tag or other indicia of being for sale;

(e) answered the questions of people passing by as to whether or not a particular painting or limited edition print was for sale;

(f) answered the questions of people passing by as to what price he might sell a particular painting for;

(g) take credit card information and arrange for delivery of a painting at a future date subject to card approval; or

(h) sell a painting in the park in exchange for cash or check.

On October 31, 1999, Plaintiff Lavery was ticketed by Defendant Cantrella specifically for displaying more than one painting at a time (even though Plaintiff told her that one was drying in between applications of paint). Defendant Cantrella applied the law to Plaintiff in such a way that she concluded that the display of more than one painting, whether or not completed, constituted an unlawful "art show without a city permit" in violation of Laguna Beach Municipal Code § 18.28.050. As stated on the citation itself, "18.28.050, prohibits art exhibition in any city park & exclude[s] art shows w/ city permit."

Defendant Cantrella (Kelso) summarized the ticketing of Plaintiff Lavery in her police report, attached to her deposition:

> On the above listed date and time I was on uniformed bicycle patrol in the 300 blk of Cliff Drive inside Heisler Park beside the Gazebo area I observed a well known Laguna Artist Michael Lavery painting. He was painting with what I believe to be oils on a large canvas set up on an easel. Lavery frequents this area when painting. He usually paints detailed ocean views over at Laguna Beach. Over years Lavery has owned art galleries at different locations throughout the city. Lavery lost a contract at his last gallery at 57 So. Coast Hwy at least 1 year ago or more. Since that time Lavery has been seen painting/displaying art at Heisler Park.
>
> The issue of the displayed art leading to sales in the park has been brought to the attention of the police department on several different occasions. I have talked to Lavery before about the city policies regarding art display and sales in the park. I recall other officers discussing this issue with Lavery in the past . I was most recently informed by Sgt. G. Bartz that Lavery had not complied with the city's policy and was still involved in displaying art other than the one being painted. I was told to do extra patrol checks in Heisler Park to see if Lavery or any other artist may be involved in this activity.
>
> Today when Lavery was painting he had another large canvas completed ocean view painting leaning against the tree in front of his work area. As I stood there I saw a citizen approach and inquire about the price of

his completed work, I got distracted and did not hear his answer. I had already explained to Lavery that I was going to issue him a citation for the display. Lavery said his painting was unsigned making it unfinished art. The public that were present disapproved of the enforcement action.

Officer Cantrella's report #99-04622. [ER-000075-78]

After meeting with various City officials, all charges against Lavery were dismissed, although the City continues to maintain that is can most assuredly continue to ticket anyone who sells art in a Laguna Beach public park without a permit, although no permits are available, except in very limited circumstances in a very limited area.

B. The Challenged Laws

The Laguna Beach Municipal Code Chapter 18.28, "Use of Parks", the law at issue is summarized as follows:

18.28.010 Parks are available for general use.

but

18.28.015(a) If an "individual or organization" is using the cobblestone area of Main Beach Park for any "constitutionally protected expressive activities involving the use of [undefined] structures [Chair? Soapbox? Easel?]", then such individual or organization may so use that park not more than two days in any six-month period, by reservation only, and must insure the City.

and

18.28.015(b) Non-profit organizations may additionally use the cobblestone area of Main Beach Park for "art and craft shows" exhibiting the art of City residents with business licenses for two days in any one month, but not more than six days total per year, by reservation only, and must insure the City in an unspecified amount, but may be waived.

and

18.28.050 Any other "art show or exhibition" [undefined] in Laguna Beach parks must be held at "Irvine Bowl Park" [a stadium which is very far from the town center].

Each of the Challenged Laws, to wit, Laguna Beach Municipal Code §§ 18.28.010, 18.28.015, 18.28.050, and 18.28.080, purport to regulate the "Use of Parks" within the City of Laguna Beach to make them "available to the public for general active and passive recreational use in accordance with the design and character of the area being used." LBMC § 18.28.010.

However, the Challenged Laws governing the use of Laguna Beach public parks single out and specifically regulate some specific types of protected activities, including **"constitutionally protected expressive activities involving the use of structures ... by an individual or organization"**, LBMC § 18.28.015(a), **"art and craft shows ... which shall be sponsored by a nonprofit organization"**, LBMC § 18.28.015(b), and **"outdoor gatherings, concerts, festivals, art shows and exhibitions"**, LBMC § 18.28.050. The activity of Plaintiff Lavery, as an artist, is thus regulated by Sections 18.28.010, 18.28.015, 18.28.050, and 18.28.080.

Under the Challenged Laws, Plaintiff and others similarly situated may **only** sell their paintings or other constitutionally protected materials in Laguna Beach City Parks subject to the following permit restrictions:

a. A ***maximum of 4 days per year*** if he wishes to sell in any area which has any walk-through traffic at all, which is namely the cobblestone area of Main Beach Park; AND

b. His choice is limited to the ***less than 1%*** of the total area of the parks which the city has designated for that purpose; AND

c. He first gets a permit with ***any conditions, rules or regulations*** that the City Manager or his designees arbitrarily wishes to impose (LBMC § 18.28.050); AND

d. He waits ***for whatever length of time*** the City wishes to take to process the permit application, there being no actual permit or reservation procedure defined in the Challenged Laws; AND

e. He pays ***whatever fees*** the City Manager or his designees wish to charge at his or her complete discretion; AND

f. He proves to the City that he has procured ***whatever amount of insurance*** coverage they arbitrarily wish him to have; AND

g. He is still a ***current resident*** of the city of Laguna Beach; AND

h. No other individuals or organizations have previously reserved the ***grand total of 5 days per month*** **(two of which go solely to non-profit organizations)** during which the permits are available (although any one person can only reserve not more than 2 days every six months, or 4 days per year).

LBMC Section 18.28.015 constitutes a prior restraint on certain types of protected activities, (a) "constitutionally protected expressive activities involving the use of structures" in Main Beach Park, and (b) "art and craft shows or exhibitions". It also impermissibly distinguishes and applies different standards and rights to non-profit organizations as opposed to individuals.

The City of Laguna Beach claims the right to reserve all but a tiny percentage of its traditional public forums, its public parks, for undefined "recreational" use, while expressly **excluding and burdening** "constitutionally protected expressive activities involving the use of structures", "art and craft shows", and " "gatherings, concerts, festivals, art shows, and exhibitions", the very activities that are supposed to be the least restricted under this Court's First Amendment jurisprudence. LBMC § 18.28.

V.

REASONS FOR GRANTING THE PETITION

A. Summary of Argument and Introduction

The Ninth's Circuit Memorandum in this case is a study in contradiction and an utter rejection of this Court's and other court's clearly established principals of First Amendment law. At a recent conference with regard to the filing and spreading of the Court's mandate, the attorneys and the District Court spent well over an hour puzzling over the meaning and intent of the contradictions in the Ninth Circuit's Memorandum.

While both Appellants and Appellees in this case submitted 60-page briefs about whether or not artwork is protected First Amendment activity, the level of protection it is to be afforded, and the level of scrutiny laws directly burdening it are to be subjected, as well as the constitutional permissibility of a law that explicitly differentiates and more heavily burdens First Amendment protected activity as compared to all other activity in public parks, the cursory 2 1/2 page memorandum of decision in this case completely disregards the entire set of issues and allows a law of prior restraint on First Amendment protected activity to effectively prohibit an entire category of speech in public forums, visual art.

Although the decision is unpublished, the Ninth Circuit should not be allowed to use the mechanism of an unpublished decision to completely disregard well established principles of First Amendment law while creating binding precedent as to the constitutionality of Section 18.28 of the Laguna Beach Municipal Code through the establishment of the law of the

case, res judicata, and collateral estoppel. *See, Ninth Circuit Rule 36-3* (unpublished decisions may be cited to when relevant under the doctrine of law of the case, res judicata, or collateral estoppel).

B. Artwork And The Sale Of Artwork Are Fully Protected Types Of Speech Under *Bery* and A Myriad Of Similar Cases, And The Laguna Beach Law Constitutes a Prior Restraint

Appellant contended on appeal that because the Laguna Beach law explicitly purports to single out people engaged in First Amendment protected activities (those involving the use of undefined "structures" and those engaged in selling or displaying artwork) and treats them differently and far more restrictively than other park users[2], it is a prior restraint on certain types of speech that is presumptively unconstitutional. *See,* Smolla, *Smolla & Nimmer on Freedom of Speech*, Ch. 15:7 (West Group 2001), and U.S. Supreme Court cases cited therein.

The Ninth Circuit did not address this assertion, but simply concluded that:

> The City has a substantial interest in preventing commerce in Heisler Park, maintaining its aesthetic beauty, and structuring the orderly movement of

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[2] The parties agreed that the parks were "quintessential public forums", *Gerritson v. City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993), in which "the City bears an exceptionally heavy burden to restrict expressive activities." *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984); et al.

> pedestrians through the park. Without the prohibition on art shows and exhibitions, Heisler Park, because of its status as a popular destination, could become 'bogged down' - both by crowds and aesthetically - by artists selling their work in the park.

Appendix 2a-3a (emphasis added).

Appellant contends that this bare conclusion disregards the contention, heavily briefed in Appellant's Opening Brief, that (1) visual artwork is not "commerce" but rather is and always has been fully protected speech[3], (2) the burden on individual

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[3] See, e.g., *Piarowsky v. Illinois Comm. College*, 759 F.2d 625 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985) **("But the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression.")**; *Miller v. California*, 413 U.S. 15, 34 (1974); *Bery v. City of New York*, 97 F.3d 689 (1996), *cert. denied*, 520 U.S. 1251, 117 S.Ct. 2408, 138 L.Ed.2d 174 (1997) **(ban on sale of art on public sidewalks unconstitutional because art is protected speech)**; *See also, e.g., Contemporary Arts Ctr. v. Ney*, 735 F.Supp. 743, 744 (S.D. Ohio 1990) **(paintings of Robert Mapplethorpe were, in absence of ruling of obscenity, protected by First Amendment)**; *Sefick v. City of Chicago*, 485 F.Supp. 644, 648 (N.S. Ill. 1979) (sculpture installation); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music, even without words); *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988) **(artistic expression protected)**; *City of Ladue v. Gilleo*, 114 S.Ct. 2038 (1994) **("Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech. Traditionally, the works of fine artists are thought to contain implicit political and social meaning, and to be a medium for**

artists of not displaying or selling their work in any public park with walk-through traffic except the main park (and there not more than four days per year), is not remotely proportional to the general interests of the City, and (3) the physical products of speech do not lose their protection simply because they are offered for sale rather than given away. *See, e.g., Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994). The Ninth Circuit does not address these points, nor the precedent supporting them, at all.

In a case directly on point in which certiorari was denied by the U.S. Supreme Court, an ordinance very similar in effect to that defended by Laguna Beach in the instant action was squarely rejected:

> A good example is *Bery v. City of New York*, 97 F.3d 689 (2d Cir.1996), *cert denied*, 520 U.S. 1251 (1997), where the Second Circuit enjoined enforcement of an ordinance that prohibited visual artists from exhibiting or selling their work in public places without a general vendors license. *Id.* At 698-99. The court held that the ordinance was not narrowly tailored, **but instead served as "a de facto bar preventing visual artists**

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communicating the artists' ideas, beliefs, and opinions."); *Hurley v. Irish-American Gay and Lesbian Bisexual Group*, 115 S.Ct. 2338, 2345, 132 L.Ed.2d 487 (1995) (**"unquestionably shielded painting of Jackson Pollack, music of Arnold Schonberg, or jabberwocky verse of Lewis Carroll"**); *Spence v. Washington*, 418 U.S. 405, 411, 41 L.Ed.2d 842, 94 S.Ct. 2727 (1974); *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1473 (C.D. Cal. 1992) (reversed on other grounds); *Cernuda v. Heavey*, 720 F.Supp. 1544, 1551 (S.D. Fla. 1989) (quoting H. Honour & J. Fleming, The Visual Artist, A History 15 (2d Ed. 1986).

> **from exhibiting and selling their art in public areas of New York**, *Id.* at 697., because it placed an exceedingly low ceiling on the number of available permits, creating a waiting list so long that even the City conceded that the plaintiffs' prospects of securing a license were nonexistent. *See id.*

Swanson, First Amendment Law Handbook, p. 901-902 (West Group 2001-2002).

As in the *Bery* case, it is the *sale* of artwork that Laguna Beach particularly seeks to prohibit. In New York, the distinction was roundly disposed of by the Second Circuit:

> The City argues that appellants' "expression" allegedly impinged by the Regulation is not in fact their art, but their peddling of the art. It argues that the sale of art is conduct, and in order to be constitutionally protected, the sale of protected material must be "inseparably intertwined with a 'particularized message.'" *Young v. New York City Transit Authority*, 903 F.2d 146, 153 (2d Cir.), *quoting Spence*, 418 U.S. at 410-11, cert. denied, 498 U.S. 984, 112 L. Ed.2d 528, 111 S. Ct. 516 (1990). The City further argues that appellants are free to display their artwork publicly without a license, they simply cannot sell it.
>
> **These arguments must fail. The sale of protected materials is also protected**. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 & 768, 108 S. Ct. 2138, 100 L. Ed.2d 771 (1988). "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v.*

Nat'l Fed'n of Blind of North Carolina, 487 U.S. 781, 801, 101 L. Ed.2d 669, 108 S. Ct. 2667 (1988).

In *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed.2d 964 (1995), the United States Supreme Court found that a ban on honoraria for government employees "imposes the kind of burden that abridges speech under the First Amendment, "in part because "the denial of compensation for lower-paid, nonpolicymaking employees will inevitably diminish their expressive output" and will "impose a significant burden on the public's right to read and hear what the employees would otherwise have written and said." Id. at 1014-15. As in the present case, without the money, the plaintiffs would not have engaged in the protected expressive activity.

Furthermore, the street marketing is in fact a part of the message of appellants' art. As they note in their submissions to the court, they believe that art should be available to the public. Anyone, not just the wealthy, should be able to view it and to buy it. Artists are part of the "real" world; they struggle to make a living and interact with their environments. The sale of art in public places conveys these messages.

Bery, 97 F.3d at 695-696.

In the instant case, as in the *Bery* case, "art shows and exhibitions" by individuals are expressly prohibited in Laguna Beach parks under Chapter 18, except for four days a year if a permit is available. Non-profit organizations are allocated an additional few more days per year for their members. The

Court in its memorandum here did not distinguish the instant restrictions from those similar restrictions struck down by the *Bery* court, given the nearly identical alleged interests.

C. The Panel Ignored Precedent Holding That Differentiating Between Types of Speech and Types of Speakers Violates Equal Protection And Erred In Finding That The Differential Treatment of Artists And Non-Profit Organizations Is Not Content-Based

The Ninth Circuit in this case found the Laguna Beach law to be content-neutral because it restricted its definition of content-neutrality to "whether the law 'distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed [citations omitted]". [Appendix 8a]

It has often been held, however, that an ordinance that subjects one <u>form</u> of protected activity to greater regulation than another is not content-neutral. *See, e.g., Watchtower Bible & Tract Society of New York v. Village of Stratton,* 122 S.Ct. 2080, 536 U.S. 150, 153 L.Ed.2d 205 (2002) (law requiring permit for canvassing door to door struck down, in part, because held not content-neutral because applies to only one <u>type</u> of speaker, canvassers); *Minneapolis Star Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 592-93, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983); *Buckley v. Valeo*, 424 U.S. 1, 18, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976).

Here, the Laguna Beach law differentiates explicitly between different *types* of speech, artwork vs. other types of "expressive activity involving the use of structures". It also explicitly differentiates between individuals and non-profit organizations, two different types of speakers. Non-profit organizations are allowed to have "art and craft" shows in the

cobblestone area of the Main Beach Park, § 18.28.015(b), whereas any other "art show or exhibition" by any type of speaker other than a non-profit organization is prohibited except at the remote Irvine Bowl stadium Park. § 18.28.050.

Treating individuals differently from non-profit organizations was expressly struck down as impermissible speaker-based discrimination by the Ninth Circuit in 1997. *Perry v. Los Angeles Police Dept.*, 121 F.3d 1365 (9th Cir. 1997), cert. denied 523 U.S. 1047, 140 L. Ed.2d 511, 118 S. Ct. 1362 (1998). In *Perry,* the Ninth Circuit wrote:

> Defendants' argument implies that plaintiffs' expressive activities should be accorded less protection than they would if those same activities were conducted by non-profit organizations. **This type of speaker-based discrimination is unacceptable**. In Schaumburg, the Court found that the solicitation of charitable donations could not be regulated by a distinction based on who was doing the soliciting. **The Court has also noted that "government regulation may not favor one speaker over another."** *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). The government's argument that prohibition of expressive speech can turn on a person's membership in a non-profit organization fails.

Perry v. Los Angeles Police Dept., 121 F.3d at 1371, *cert denied.*

The *Perry* court went on to reject the district court's reliance on *One World* (which is also relied upon by the Ninth Circuit in the case at bar): "Accordingly, appellees rely

primarily on *One World* to support their case. However, in *One World*, the restriction did not discriminate against certain types of speech depending on the speaker." *Perry v. Los Angeles Police Dept.*, 121 F.3d at 1371.

There is no explanation by the Court as to why it is permissible for Laguna Beach to treat non-profit organizations differently from individuals, or why it is permissible for Laguna Beach to allow "art and craft" shows only by non-profit organizations as opposed to individuals, or why it is permissible for Laguna Beach to treat artists differently from other types of speakers, nor why these speaker-based distinctions are not subjected to exacting First Amendment scrutiny.

This type of differential treatment based on one's membership in a type of organization or not has also previously been held by the Ninth Circuit to constitute an impermissible violation of equal protection, exactly the opposite of the Ninth Circuit's conclusion in the instant matter:

> The government restriction banning sales and solicitations of donations contains an exception for non-profits. **When a government allows some forms of protected speech but prohibits other forms of protected speech, the Equal Protection Clause is implicated, and the government must show that the distinctions are "finely tailored to serve substantial state interests."** *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2286, 2290-91, 65 L.Ed. 2d 263(1980).

Perry v. Los Angeles Police Dept., 121 F.3d at 1368. The Court does not explain the distinction it is apparently making between that decision and the instant one, where the alleged

governmental interest is essentially the same as in *Perry* and in *Bery*.

D. Just Like In *Bery*, The Laguna Beach Law Is Not Narrowly Tailored And There Are No Ample Alternative Channels Of Communication In Public Forums In Laguna Beach, And The Panel Gives No Explanation As To How The Disputed Evidence Could So Summarily Be Found In the City's Favor

The Ninth Circuit concluded but also did not elaborate on why the use of the distant and un-populated stadium known as Irvine Bowl Park is an "ample alternative" for the exhibition and sale of one's artwork. The City's own witness, Defendant Bartz, testified that Irvine Bowl Park has no "walk-through" traffic at all, unlike the well populated Heisler Park.

Even if a law is content-neutral (which Petitioner argues this one is not, as above), then the two-prong test of narrowly tailored and ample alternative channels of communication must both be satisfied, neither of which Petitioner contends was properly analyzed by the Ninth Circuit. The *Bery* court reiterated this Court's requirements:

> A content-neutral regulation may restrict the time, place, and manner of protected speech, provided it is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S.Ct. at 2752, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). The City certainly has a significant interest in keeping its public

> spaces safe and free of congestion. **The license requirement as it relates to appellants, however, which effectively bars them from displaying or selling their art on the streets, is too sweeping to pass constitutional muster.** See, e.g., *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30, 113 S.Ct. 1505, 1516-17, 123 L.Ed.2d 99 (1993). **The district court's failure to properly analyze the questions of narrow tailoring and alternative channels was an abuse of discretion that led to an incorrect result.**

Bery v. City of New York, 97 F.3d at 697.

Here, the Ninth Circuit does not provide any factual or legal support for its bald one sentence conclusion that there are "ample alternatives available for expression", in light of the fact that there are *no* parks in the town proper that can be used for art shows or exhibitions, or for "constitutionally protected expressive activities involving the use of structures", except for a few days a year by any one person or group on a first-come, first-served basis.

As in the instant case, the City in *Bery* made nearly identical arguments about the availablity of galleries, restaurants, homes, fairs, etc., as "alternative channels of communication" which were soundly rejected by the Second Circuit:

> The City states that alternatives exist; appellants may sell their artwork from their homes or seek permission to display it in restaurants and street fairs and the like. **However, appellants are entitled to a public forum for their expressive activities.** *Southeastern Promotions Ltd.*, 420 U.S. at 556 , 95 S.Ct. at

1245(1975); *Gold Coast Pub., Inc. v. Corrigan*, 798 F.Supp. 1558, 1572 (S.D.Fla.1992), aff'd in part, rev'd in part on other grounds, 42 F.3d 1336 (11th Cir.1994), cert. denied, 516 U.S. 931, 116 S.Ct. 337, 133 L.Ed.2d 236 (1995). **Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums. The public display and sale of artwork is a form of communication between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.**

Furthermore, to tell appellants that they are free to sell their work in galleries is no remedy for them. They might not be at a point in their careers in which they are interested in reaching the public that attends exhibits at art galleries--if, indeed, they could get their works accepted for showing. Appellants are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing appellants' works. **The sidewalks of the City must be available for appellants to reach their public audience.** The City has thus failed to meet the requirement of demonstrating alternative channels for appellants' expression.

Bery v. City of New York, 97 F.3d at 698. In other words, the holding of the Second Circuit and the Ninth Circuit are exactly the opposite.

E. The Ninth Circuit Made An Impossibly Contradictory Set Of Holdings As To Vagueness, Qualified Immunity, And Municipal Liability

The Ninth Circuit states at one point in the decision that it "affirms the district court's summary judgment in favor of the City on Lavery's First Amendment challenges" and finds that "the ordinances are neither facially vague nor overbroad." On the other hand, the Ninth Circuit writes that, "We do find, however, that the ordinances are unconstitutionally vague as applied to Lavery. A person of ordinary intelligence would not know whether placing one piece of art against a tree[4] constitutes an art show or exhibition."[5]

Appellant contends that if "the ordinances" are vague "as applied to" him, for being such that a "person of ordinary intelligence" could not understand them, then they are surely vague on their face and necessarily vague as to all persons similarly situated who might fall under the purview of the laws. Indeed, vagueness is a doctrine by which a person is

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[4] Oddly, Lavery was ticketed for having *more than one* piece of art on display, not just one.

[5] This is the point of difference from the original memorandum, which had stated, "the ordinances are *overbroad* as applied to Lavery. By prohibiting the conduct of placing one piece of art against a tree because it is an art show or exhibition, the ordinances burden substantially more speech than is necessary to achieve their articulated goal." [Appendix 9a] In their petition for rehearing, Appellants objected to the use of the facial overbreadth doctrine to reach an as applied holding, so the Ninth Circuit modified the holding to one of "vagueness".

allowed to facially attack a law as unconstitutional - i.e., to have it declared "void on its face", regardless of whether that law was constitutionally applied to him or her. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); *Perry v. LAPD*, infra.

This Court expressed the importance of the vagueness doctrine in First Amendment cases: Those "sensitive to the perils posed by ... indefinite language, avoid the risk ... only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). Appellant submits that it makes absolutely no sense for the Court to (1) limit its vagueness finding to Appellant Lavery, and (2) at the same time, find "in favor of the City on Lavery's First Amendment challenges", while (3) reversing on the issue of municipal liability. To be consistent with its own stated opinion and the relevant precedents, the Court should have logically found the ordinances to be vague on their face as well, in violation of the First Amendment. Without explanation, it did not do so.

To further confuse matters, the Ninth Circuit "affirm[ed] the district court's judgment on qualified immunity because Lavery cannot show that the officers acted unreasonably." However, the qualified immunity question does not turn precisely on whether or not an officer acted "reasonably", but on whether or not the law governing the First Amendment right at issue was clearly established at the time of the alleged violation. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

"'[P]recedent directly on point is not necessary to demonstrate' that a right is clearly established. *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997). Rather, if 'the

unlawfulness [is] apparent in light of preexisting law,' then the standard is met. *Id.* at 254. In addition, even if there is no closely analogous case law, a right can be clearly established on the basis of 'common sense.' *DeBoer v. Pennington*, 206 F.3d 857, 865 (9th Cir. 2000)." *Giebel v. Sylvester*, 01 C.D.O.S. 2926 (9th Cir. No. 88-36105) (April 12, 2001).

The law governing First Amendment protected activities is and has been for some time clearly established. As discussed, art has been clearly found to constitute protected speech, and speech has unequivocally been found to not lose its protection just because it is sold rather than given away. Likewise, the law of prior restraint and vagueness have long since been clearly established. If the law under which Lavery was ticketed is vague under that clearly established First Amendment jurisprudence, then the officers who exercised their discretion under the vague law and ticketed him for engaging in protected First Amendment activity should not have been afforded qualified immunity.

As Justice O'Conner has pointed out, the importance of the vagueness doctrine is to reinforce fundamental notions concerning the control of the discretion of law enforcement officers:

> **[T]he more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement."** Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 358, 103 S.Ct. 1855, 11858, 75 L.Ed.2d 903 (1983), *quoting Smith v. Goguen*, 415 U.S. 566, 574-75, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974). *See also, Houston v. Hill*, 482 U.S. 451, and n. 15, 107 S.Ct. 2502, and n. 15, 96 L.Ed.2d 398 (1987).

Here, the officers exercised their discretion under a vague law in a manner that violated clearly established law, and therefore their conduct should not have been afforded qualified immunity. Not only have the officers been allowed to ignore clearly established First Amendment law, the Ninth Circuit itself ignored clearly established First Amendment rights in rendering its decision in this challenge to the Laguna Beach Municipal Code.

VI.

CONCLUSION

Petitioner contends that in a number of ways, the Ninth Circuit's Opinion in this case conflicts with the precedent set by this Court and that of other Circuits, creating a decision that is fundamentally wrong and that severely chills the rights of those engaged in what has consistently been held to be First Amendment protected activity, visual art, in public forums, and improperly upholds a law that substantially restricts First Amendment protected activity in public forums.

Based on all of the foregoing, Petitioner respectfully submits that a grant of certiorari is appropriate.

DATED: August 18, 2003

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-55280

[Filed May 20, 2003]

MICHAEL J. LAVERY,
Plaintiff - Appellant,

v.

CITY OF LAGUNA BEACH;
LAGUNA BEACH POLICE DEPARTMENT;
KENNETH FRANK; DEBRA CANTRELLA;
GREG BARTZ,
Defendants - Appellees.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-00-00388-GLT
Gary L. Taylor, District Judge, Presiding

AMENDED MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

JUDGES

Before: LAY,** HAWKINS and TALLMAN, Circuit Judges.

Michael Lavery appeals the district court's orders granting summary judgment to the City of Laguna Beach and other individuals who work for the City and the City's Police Department. We affirm in part and reverse and remand in part.

We affirm the district court's summary judgment in favor of the City on Lavery's First Amendment challenges. The laws at issue are content neutral. Content neutrality is judged by whether the law "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed . . . ." *Foti v. City of Menlo Park,* 146 F.3d 629, 636 (9th Cir. 1998) (quoting *Tuner Broad. Sys. v. F.C.C.,* 512 U.S. 622, 643, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)). Here, the ordinances do not discriminate on the basis of the views expressed. *See One World One Family Now v. City of Honolulu,* 76 F.3d 1009, 1012 n.5 (9th Cir. 1996).

As content neutral laws, the ordinances pass constitutional muster because they are narrowly tailored both facially and as applied. The City has a substantial interest in preventing commerce in Heisler Park, maintaining its aesthetic beauty, and structuring the orderly movement of pedestrians through

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** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

the park. Without the prohibition on art shows and exhibitions, Heisler Park, because of its status as a popular destination, could become bogged down--both by crowds and aesthetically--by artists selling their work in the park. *See id.* at 1013-14.

Nor do the ordinances grant unbridled discretion to government officials enforcing the law. Unlike the permit schemes in *Gaudiya Vaishnava Society v. City of San Francisco,* 952 F.2d 1059 (9th Cir. 1991) and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988)--which provided officials the power to grant permits but did not articulate why, how, or when--the ordinances in this case do not give the city manager the "power to discriminate [which] raises the spectre of selective enforcement on the basis of the content of speech." *N.A.A.C.P., Western Region v. City of Richmond,* 743 F.2d 1346, 1357 (9th Cir. 1984). Finally, we also agree with the district court that there are ample alternatives available for expression.

We also affirm the district court's judgment that the ordinances are neither facially vague nor overbroad. We do find, however, that the ordinances are unconstitutionally vague as applied to Lavery. A person of ordinary intelligence would not know whether placing one piece of art against a tree constitutes an art show or exhibition.

We affirm the district court's judgment on Lavery's retaliation claim because Lavery fails to present enough evidence to create a genuine issue of material fact that retaliatory intent was a motivating factor that caused his receipt of a citation.

Because we find that the ordinances are vague as applied to Lavery, we reverse the district court's grant of summary judgment to the City on the issue of municipal liability. But we affirm the district court's judgment on qualified immunity because Lavery cannot show that the police officers or other City officials acted unreasonably. We also affirm the district court's judgment on Lavery's equal protection claims for the reasons stated by the district court.

Each party to bear its own costs.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-55280

D.C. No. CV-00-00388-GLT

[Filed May 20, 2003]

MICHAEL J. LAVERY, Plaintiff- Appellant,	)
v.	)
CITY OF LAGUNA BEACH, et al., Defendants- Appellees.	)

ORDER

Before LAY,* HAWKINS, and TALLMAN, Circuit Judges.

In light of the amended Memorandum disposition filed contemporaneously with this Order, the panel has voted to deny the petition for panel rehearing. Judges Hawkins and Tallman have voted to deny the petition for rehearing and

* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

petition for rehearing en banc and Judge Lay would so recommend.

The full court has been advised of the petition for rehearing en bane and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en bane are denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-55280

D.C. No. CV-00-00388-GLT

[Filed April 10, 2003]

MICHAEL J. LAVERY, Plaintiff- Appellant, v. CITY OF LAGUNA BEACH; LAGUNA BEACH POLICE DEPARTMENT; KENNETH FRANK; DEBRA CANTRELLA; GREG BARTZ, Defendants- Appellees.	)

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted March 5, 2003
Pasadena, Cafifornia

Before: LAY,* HAWKINS and TALLMAN, Circuit Judges.

MEMORANDUM**

Michael Lavery appeals the district court's orders granting summary judgment to the CiW of Laguna Beach and other individuals who work for the City and the City's Police Department. We affirm in part and reverse and remand in part.

We affirm the district court's summary judgment in favor of the City on Lavery's First Amendment challenges. The laws at issue are content neutral. Content neutrality is judged by whether the law "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed..." *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998) (quoting *Tuner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 643 (1994)). Here, the ordinances do not discriminate on the basis of the views expressed. *See One World One Family Now v. City of Honolulu,* 76 F.3d 1009, 1012 n.5 (9th Cir. 1996).

As content neutral laws, the ordinances pass constitutional muster because they are narrowly tailored both facially and as applied. The City has a substantial interest in preventing commerce in Heisler Park, maintaining its aesthetic beauty, and structuring the orderly movement of pedestrians through the park. Without the prohibition on art shows and

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* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

exhibitions, Heisler Park, because of its status as a popular destination, could become bogged down--both by crowds and aesthetically--by artists selling their work in the park. *See id.* at 1013-14.

Nor do the ordinances grant unbridled discretion to government officials enforcing the law. Unlike the permit schemes in *Gaudiya Vaishnava Society v. City of San Francisco,* 952 F.2d 1059 (9th Cir. 1991) and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988)--which provided officials the power to grant permits but did not articulate why, how, or when--the ordinances in this case do not give the city manager the "power to discriminate [which] raises the spectre of selective enforcement on the basis of the content of speech." *N.A.A.C.P., Western Region v. City of Richmond,* 743 F.2d 1346, 1357 (9th Cir. 1984). Finally, we also agree with the district court that them are ample alternatives available for expression.

We also affirm the district court's judgment that the ordinances are not vague. We do find, however, that the ordinances are overbroad as applied to Lavery. By prohibiting the conduct of placing one piece of art against a tree because it is an art show or exhibition, the ordinances burden substantially more speech than is necessary to achieve their articulated goal.

We affirm the district court's judgment on Lavery's retaliation claim because Lavery fails to present enough evidence to create a genuine issue of material fact that retaliatory intent was a motivating factor that caused his receipt of a citation.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-55280

D.C. No. CV-00-00388-GLT

[Filed July 31, 2003]

MICHAEL J. LAVERY, Plaintiff- Appellant,	)
v.	)
CITY OF LAGUNA BEACH; LAGUNA BEACH POLICE DEPARTMENT; KENNETH FRANK; DEBRA CANTRELLA; GREG BARTZ, Defendants- Appellees.	)

JUDGMENT

APPEAL FROM the United States District Court for the Central District of California (Santa Ana).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

Central District of California (Santa Ana) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party to bear its own costs.

Filed and entered April 10, 2003
amended May 20, 2003

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SA CV 00-0388-GLT (Eex)

Calendar #15

[Filed January 14, 2002]

MICHAEL J. LAVERY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF LAGUNA BEACH, et al.,	)
	)
Defendants.	)
	)

[~~TENTATIVE~~] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment is GRANTED.

I. BACKGROUND

Plaintiff is a commercial artist who sells his paintings in public beach parks of the City of Laguna Beach. Plaintiff was ticketed by officer Defendants Kelso and Bartz, members of Defendant Laguna Beach Police Department, and at the approval of Defendant Frank, the City Manager, for violation of Section 18.280.050 of the Laguna Beach Municipal Code ("LBMC"). Section 18.28.50 regulates "outdoor gatherings" including "art shows and exhibits." These charges were later dropped after a meeting with Defendant Frank.

This Court granted partial summary judgment in favor of Defendants, finding the LBMC provisions were constitutional as valid "time, place, and manner" restrictions. The Court allowed Plaintiff [Plaintiff's] constitutional rights."[1] *See* May 11, 2001, Order at 11.

Plaintiff filed a Second Amended Complaint ("SAC") stating:

> This action constitutes an 'as applied' challenge to [the LBMC] Sections...for threatening to arrest and/or ticket Plaintiff under any or all of said code sections, harassing Plaintiff, and ticketing Plaintiff, all without probable cause or due process An violation of his First, Fourth, and Fourteenth Amendment rights, and

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[1] Although Defendants contend the Court's May 2001 Order finding the LBMC sections constitutional on their face also bars an "as applied" challenge, the Court made no such finding and specifically allowed Plaintiff leave to amend to allege such a cause of action.

for retaliation against Plaintiff in violation of his First Amendment rights.

See SAC at ¶ 2. Plaintiff asserts these alleged constitutional right violations under 42 U.S.C. § 1983 and also brings claims for injunctive and declaratory relief and failure to train and supervise/maintenance of illegal customs and policies. *See* SAC at 4 10.

Defendants now move for summary judgment of Plaintiff's claims.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as matter of law." Fed. R. Civ. P. 56(c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party in a summary judgment motion bears the initial burden of proving the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party makes this initial showing, the burden shifts to the nonmoving party to "designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (citation omitted). In other words, the non-moving party must produce evidence that could cause

reasonable jurors to disagree as to whether the facts claimed the moving party are true.

In making a summary judgment determination, the Court must view the evidence presented in the light most favorable to the non-moving party, drawing "all justifiable inferences ... in his favor." *Anderson*, 477 U.S. at 255. If the non-moving party fails to present genuine issue of material fact, the Court must grant summary judgment. *Celotex*, 477 U.S. at 323-24. If the evidence of a genuine issue of material fact is "merely colorable" or of insignificant probative value, summary judgment is also appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

B. First Amendment Claim

Plaintiff alleges Defendants violated his First Amendment right by singling him out for enforcement and threats of enforcement of the LBMC. Plaintiff alleges this "harassment" was in retaliation for Plaintiff's protest of city development and the enforcement of the LGMC provisions.[2]

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[2] Plaintiff's Opposition argues "if artwork is protected activity... [a] constitutional violation occurred because the laws in question do not state with sufficient specificity to pass First Amendment scrutiny that displaying more than one painting constitutes an unlawful "art show or exhibition.'" *See* Opp. at 6. This is not a First Amendment retaliation claim, but seems to argue the LBMC Sections at issue are unconstitutional under the First Amendment or there was not probable cause for Plaintiff's citation and therefore his freedom to paint was denied. In its May 2001 Order, this Court specifically found the LBMC Sections at issue were constitutional. Plaintiff's attempt to reassert this issue is therefore unavailing.

Under this retaliation theory, Plaintiff must provide evidence showing Plaintiff engaged in constitutionally protected activity and Defendant's conduct was motivated by an intent to retaliate for Plaintiff's exercise of constitutionally protected activity. *See Mendocino Envtl. Ctr. v. Mendocino County*, 14 F.3d 457, 464 (9th Cir. 1994) ("Governmental action designed to retaliate against and chill political expression strikes at the heart of the First Amendment") (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).

Assuming, without deciding, Plaintiff engaged in a constitutionally protected activity, Plaintiff has failed to provide any evidence indicating Defendant's retaliatory intent was a "substantial or motivating factor" behind enforcing the LBMC provisions against Plaintiff. *See Nelson v. Pima Community College*, 83 F.3d 1075, 1080 (9th Cir. 1996) (discussing elements of First Amendment retaliation claim in context of employment-based retaliation). While Plaintiff argues "[t]he ticketing was part of the Defendants' planned scrutiny of Plaintiff"[3] (Opp. at 5) and Plaintiff "was only ticketed as part of Defendants' continuing pattern of harassment and retaliation against him" (Opp. at 7), Plaintiff offers no evidentiary support for these conclusory allegations. Plaintiff's deposition, to which Plaintiff refers without citation, restates the same general, conclusory allegations of retaliation contained in his pleadings and is not supplemented with supporting evidence. *See Anderson*, 477 U.S. at 249 ("a

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Plaintiff's "lack of probable cause" argument is addressed below.

[3] In support of this allegation Plaintiff's Opposition states "*see xxxx.*" Opp. at 5.

party opposing a properly supported motion for summary judgment may not rest upon the mere allegations denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"). In fact, Plaintiffs deposition only offers evidence of uniform enforcement of the LBMC. Plaintiff stated he knew at least two other artists who were cited threatened with citations for violating the LBMC provisions regular the sales and display of artwork in Laguna Beach public parks.

Summary judgement is appropriate on Plaintiff's First Amendment Claims under § 1983.

C. Equal Protection Claim

Plaintiff similarly alleges discriminatory "harassment" and the selective enforcement of the LBMC deprived him of equal protection under the law guaranteed by the Fourteenth Amendment.

A § 1983 plaintiff alleging an equal protection violation must establish that the unlawful discrimination was intentional. *See Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1025 (1998). To maintain a selective enforcement or discriminatory prosecution claim giving rise to an equal protection violation, the following showing is required: (1) That others similarly situated are generally not prosecuted for the same conduct; and (2) The decision to single out Plaintiff was based upon impermissible grounds such as race, religion, or the exercise of constitutional rights. *See Church of Scientology v. Commissioner of Internal Revenue*, 823 F.2d 1310, 1320-21 (9th Cir. 1987). "Selective enforcement of valid laws, without more, does not make the

defendants' action irrational." *Freedman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995).

Plaintiff has failed to provided evidence indicating other similarly situated artists were not prosecuted under the LBMC. As noted above, Plaintiff's deposition states other similarly situated artists were in fact cited for the same violation as Plaintiff. Plaintiff's Opposition further supports a general application of the LBMC: "[c]ommencing in about 1993 and continuing to the present, the LBPD and the individual defendants decided to attempt to enforce LBMC Section 18.28.050 against artists working on more than one painting the City's public forum...."[4] Plaintiff similarly offers no evidence indicating the decision to allegedly single out Plaintiff was based upon the exercise of his constitutional rights. Plaintiff's conclusory allegations the enforcement of the LBMC was in retaliation for Plaintiff's political protest, without more, is not enough to survive summary judgment.

Summary judgement is appropriate on Plaintiff's Equal Protection claim.

D. Fourth Amendment Claim

Plaintiff claims he was falsely arrested under LBMC Section 18.28.050 in violation of his rights under the Fourth Amendment.

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[4] While Plaintiff agues LBMC Section 18.28.050 does not prohibit artists from working on more than one painting at a time in public forums, this is irrelevant to Plaintiff's selective prosecution claim.

"Probable cause for a warrantless arrest arises when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed, is committing, or is about to commit an offense." *Barry v. Fowler*, 902 determination of probable cause is based on the totality of circumstances known to an officer at the time of the arrest. *Id.* The existence of probable cause precludes a finding of false arrest under § 1983. *See Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981).

Plaintiff was cited by Officer Kelso for violating LBMC Section 18.28.050 which prohibits any outdoor "art show" not held at Irvine Bowl Park. The City has construed "art show" to mean the display of artwork in the City's parks for the purpose of selling or soliciting the sale of artwork. Under the "totality of the circumstances," it was reasonable as a matter of law for Officer Kelso to conclude there was probable cause to believe Plaintiff's conduct was in violation of LBMC Section 18.28.050. Officer Kelso observed Plaintiff painting of work while another work was displayed against a tree. Officer Kelso noted the displayed work depicted a coastal landscape scene and was ostensibly finished. Officer Kelso knew the area in which the art work was displayed was commonly frequented by tourists and further knew Plaintiff had sold paintings on earlier occasions in this area. Officer Kelso also was aware Plaintiff had been evicted from his only gallery space and he had not opened another gallery elsewhere in Laguna.

Plaintiff has not offered evidence establishing a triable issue of fact as to probable cause. Plaintiff contends the displayed artwork was not finished and he told Officer Kelso this at the time o the citation. The facts known to Officer

Kelso nevertheless provide probable cause for the citation. *See Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988) ("A policeman...is under no obligation to give credence to a suspect's story nor should plausible explanation in any sense require the officer to forgo arrest pending further investigation if the facts as initially discovered provide probable cause."). While the citation was later dismissed, this does not mean Officer Kelso lacked probable cause in issuing the citation. *See Freeman*, 68 F.3d at 1189; *see also Baker v. McCollan*, 443 U.S. 137, 145 (1979) ("The Constitution does not guarantee that only the guilt will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted - indeed for every suspect released.")

Because probable cause for the citation existed, Plaintiff's arrest was reasonable under the Fourth Amendment. Summary judgment appropriate on Plaintiff's Fourth Amendment claims.[5]

E. Failure to Train/Supervise Claim

Plaintiff's Fourth Claim for Relief alleges municipal liability against the City of Laguna Beach.[6] Plaintiff asserts

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[5] While not essential to this judgment, a finding of probable cause necessarily dictates Defendants Bartz and Kelso also have qualified immunity. *See Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1991) (finding that, to overcome a defense of qualified immunity under § 1983, plaintiff must show probable cause did not exist and the officers did not have reasonable belief of probable cause).

[6] Plaintiff's SAC lists the Failure to Train and Supervise claim as the Fourth Claim For Relief, but there is no Third Claim For Relief

that, under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), Defendant City of Laguna Beach is liable to Plaintiff for failure "to train and supervise their employees to prevent violation of Plaintiff's [constitutional] rights and maintained their illegal customs and policies in the face of complaints about and knowledge of the illegality of this conduct." *See* SAC at ¶ 37. In support of this claim, Plaintiff's Opposition argues: "[t]he existence of the unconstitutional law and its enforcement against plaintiff and others establishes an illegal policy and/or custom that was the driving force behind the violation of plaintiff's rights." *See* Opp. at 13. Plaintiff also offers an excerpt Officer Kelso's deposition stating she (Officer Kelso) believed she was following an official policy of the City of Laguna Beach when she gave Mr. Lavery a citation.

As decided in this Court's May 2001 Order, the LBMC Sections a issue in this litigation are facially constitutional. The enforcement of the LBMC Sections is therefore not a custom or policy of denying Plaintiff or other Laguna Beach residents their constitutional rights. Neither is the training of Laguna Beach Police officers to enforce LBMC a failure to train or supervise under *Monell*.

Defendants' Motion for Summary Judgment is GRANTED.

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found in the SAC. Plaintiff's Second Claim for Relief is for Injunctive and Declaratory Relief and hinges upon the continued unconstitutional enforcement of the LBMC against Plaintiff. As discussed above, Plaintiff has provided no evidence establishing a triable issue of fact as to the unconstitutional enforcement of the LBMC at any time against Plaintiff.

DATED: January 14, 2002

/s/ _____
Gary L. Taylor
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. SA CV 00-0388-GLT (Eex)

[Filed May 11, 2001]

MICHAEL J. LAVERY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF LAGUNA BEACH, et al.,	)
	)
Defendants.	)
	)

ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANTS

Partial summary judgment for Defendants is GRANTED. The Court holds the subject municipal code sections are not unconstitutional on their face.

The Court does not now rule on Plaintiff's contention that the issuance of a ticket violated his Constitutional rights, but on its own motion, directs Plaintiff to file an amended complaint set forth that theory with particularity.

I. BACKGROUND

Plaintiff is a commercial artist who sells his paintings in public beach parks of the City of Laguna Beach. Plaintiff was ticketed by officer Defendants Cantrella (aka Kelso), and Bartz, members of Defendant Laguna Beach Police Department ("LBPD"), and the approval of Defendant Frank, the City Manager, allegedly for violation of Section 18.28.050 of the Laguna Beach Municipal Code ("LBMC") for dlsplaylng more than one painting at the same time.[1] Plaintiff contends he was merely letting the paint dry on first painting while he worked on the second painting, and the first painting was unfinished. Defendant Kelso contends Plaintiff was going to sell the painting as soon as it was signed.

The primary Code section at issue regulates "outdoor gatherings" including "art shows and exhibitions." Plaintiff alleges the LBPD has enforced Section 18.28.050 of the Code against artists working on more than one painting in the City's forums or attemptlng to sell or receive donations for any of their work since 1993.

Plaintiff also alleges the LBPD discretionarily interpreted enforced other Code Sections, including Sections 18.28.010, 18.28.015, and 18.28.050, so as to prohibit the display or sale of artwork on City property in public forums. Plaintiff contends this is a violation of his First Amendment right to free expression. Plaintiff also brings claims for violation of equal protection and due process of law, injunctive and

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[1] These charges were dropped at a meeting with Defendant Frank.

declaratory relief, and failure to train and supervise and maintenance of illegal customs and policies.

Plaintiff and Defendants cross-move for summary judgment. Plaintiff contends the LBMC provisions are facially unconstitutional, and Defendant contends commercial speech is not protected.

II. ANALYSIS

A. First Amendment

Municipalities have an inherent police power which provides them the right to adopt ordinances and regulations promoting and protecting the public's health, safety, and general welfare. *See, e.g., Members of the City Council of Los Angeles v. Vincent*, 466 U.S. 789, 805 (1984); *Euclid v. Ambler Realty Co.*, 365, 393 (1926). Municipal ordinances cannot be set aside unless they are "unconstitutional or ultra vires, or in some special connection or effect, unreasonable." *City of Anchorage v. Richardson Vista Corp.*, 242 F.2d 276, 285-86 (9th Cir. 1957).

Section 18.28.050 of the Laguna Beach Municipal Code provides:

> Outdoor gatherings, concerts, festivals, art shows and exhibitions. Any outdoor gathering, concert, festival, art show or exhibitions not otherwise provided for in this chapter shall be held at Irvine Bowl Park. The use of the amphitheater and festival grounds at Irvine Bowl shall be on a first-come- first-served basis by reservation through the city and is subject to the

> requirements of any existing or subsequently approved lease of those facilities. Nothing in this chapter shall be construed to supersede the provisions of any such lease. Outdoor gatherings to be attended by more than twenty-five hundred persons require a license pursuant to Chapter 5.68 of this code.

LBMC Section 18.28.010 provides in part:

> General use. Unless otherwise reserved pursuant to this chapter, city parks are available to the public for general active and passive recreational use in accordance with the design and character of the area being used. No reservations shall be taken for general use of parks ....

LBMC Section 18.28.015 states:

> Main Beach Park. (1) In accordance with the provisions of Section 18.28.010, the hard surface cobblestone area located in the southerly portion of Main Beach Park shall be available not more than five days per month on a first-come-first-served basis by reservation through the city for the conduct of constitutionally protected expressive activities involving the use of structures. Such activities, which shall be sponsored by an individual or organization, may be conducted by the same individual or organization on not more than two days in any consecutive six-month period. (b) In accordance with the provisions of Section 18.28.010, the ... portion of Main Beach park shall be available not more than two days per month on a first-come-first-served basis by

> reservation through the city for the conduct of art and craft shows. Such activities, which shall be sponsored by a nonprofit organization, may be conducted by the same organization ....

LBMC Section 18.28.080 states:

> Administration. The city manager or his/her designee shall be responsible - for the administration of this chapter and shall develop application forms and any further rules and regulations deemed necessary to administer it .... Any determination by the city manager or his/her designee may be appealed to the city council ....

The First Amendment provides: "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. Const. amend. I. The Due Process clause of the Fourteenth Amendment makes this prohibition applicable to state action. *See, e.g., Stromberg v. California*, 283 U.S. 359, 368 (1931). Art is considered protected expression under the First Amendment. *See Miller v. California*, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.").

"The Constitution affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Public Service Com'n of New York*, 447 U.S. 557, 562-63 (1980). However, this does not mean an expressive item loses its constitutional protection

because it is sold rather than given away. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

There is a dispute about whether Plaintiff was merely displaying his artwork, or whether it was for sale. For purposes of these cross-motions for summary judgment, the Court will assume the artwork is fully protected speech and will not delve into the issue of commercial versus non-commercial speech. The question, then, is whether the City has a right to regulate Plaintiff's activities in a public forum.

1. Time, Place, and Manner Restrictions

In a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting on *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The test of content neutrality "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." *Ward*, at 791. As reasons for instituting its policy, the City cites the prevention of "discordant and excessive commercialism in the parks," maintenance of "the park's natural beauty and aesthetic integrity," protection against "degraded aesthetic values," promotion of "public safety and orderly movement of

pedestrians in the highly crowded parks and beaches," and protection of "the local merchant economy from unfair competition presented by rent-free business enterprises conducted on public property." Defendants' Motion for Sum. Judg., at 18. These justifications for the ordinances have nothing to do with content, and the ordinances satisfy the content neutrality provision. *See Ward*, at 791 (quoting *Boos v. Barry*, 485 U.S. 312, 320 (1988)).[2] There are also alternate channels for Plaintiff to express himself, including painting in City parks, exhibiting his artwork in other City venues that provide for non-commercial exhibitions, or selling paintings on the internet or a home studio.

Because Defendants do not restrict Plaintiff from painting or control the content of the painting, because the time, place, manner restrictions have a reasonable government justification, and because there are alternate means open to Plaintiff to display and sell his works, the ordinances pass the time, place, and manner" test.

2. Overbreadth, Vagueness, and Unbridled Discretion

a. Overbreadth

The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973). This

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[2] Nothing on the face of the ordinances refer to the content of the art.

is true "particularly where conduct and not merely speech is involved." *Id.* at 615.

Plaintiff contends the Ordinances are overbroad because the regulated conduct includes all "general uses" which could mean both protected and unprotected activities. LBMC § 18.28.010. This section of the Code, however, is a default provision which states, "Unless otherwise reserved pursuant to this chapter, city parks are available to the public for general active and passive recreational use in accordance with the design and character of the area being used. No reservations shall be taken for general use of parks." Plaintiff's use is restricted by another code provision. This section is not overbroad.

In addition, Plaintiff argues an overly broad range of conduct is prohibited ("expressive activities involving the use of structures") and because the kind of conduct is undefined ("outdoor gatherings, concerts, festivals, art shows, and exhibitions"). In fact, the language of the ordinance is specific. The City has detailed exactly what is regulated.

b. Vagueness

A statute can be impermissibly vague for either of two independent reasons: if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or if it authorizes or encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (relying on *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)).

Plaintiff contends the Ordinances contain numerous provisions which render it vague under the First Amendment. In particular, Plaintiff cites Section 18.28.015 as requiring unspecified amounts of insurance and Section 18.28.050 as authorizing the City Manager or his designees to impose any rules, regulations, or fees they want. In addition, Plaintiff alleges he was cited for violation of 18.28.050 on the grounds the section "prohibits art exhibition in any city park and excludes art shows without city permit," yet nothing in the Ordinances requires a permit. Kelso Depo., Exh. 2 at B-17.

The Supreme Court has stated cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity." *Ward*, at 793. In this case, the City Manager does not have "unbridled discretion" over the expressive activity in question. First, Section 18.28.080 provides the City Council has authority over the City Manager. In addition, Section 18.28.015 states that reservations "shall" be granted on a first-come-first-served basis for the conduct of constitutionally protected expressive activities involving the use of structures. The word "shall" mandates that whoever requests the reservations first will be granted them. There is no discretion on the part of the manager which needs to be applied in the granting of these reservations.

The "insurance" provision in section 18.28.015 deals with the obligation of the art and craft show sponsors to obtain insurance for their shows, "in the amount established by the city council therefor." This is not vague on its face.

3. Special Treatment

Plaintiff argues the Ordinances make a portion of Main Beach Park available two days per month to non-profit organizations to hold "art and craft shows," which discriminates against speakers. LBMC § 18.28.015 (b). In addition, Plaintiff contends the Ordinance regulates "constitutionally protected expressive activities involving the use of structures." LBMC § 18.28.010. Plaintiff also argues the Ordinances are not narrowly tailored to advance the government's interest.

The cases Plaintiff cites demonstrate the disparity between the treatment of non-profits and for-profits. However, all deal with commercial activity related to fundamentally protected speech involving "speech seeking support for particular causes or for particular views on economic, political, or social issues." *Gaudiya Vaishnava Soc. V. San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1991) (citing *Schamburg v. Citizens for Better Environment*, 444 U.S. 620, 633 (1981)). Those cases are distinguishable from this case because of Plaintiff's lack of a particular point of view or message. Section 18.28.010 does not purport to regulate speech; it merely purports to regulate the use of structures. Finally, the Court has already discussed the legitimate reasons set forth by the City in regulating the use of its public parks.

B. Equal Protection

Artists are not a "suspect class," and holding art exhibitions in public is not a "fundamental right," so the Court must apply the rational basis test. That test entails determining whether the regulatory scheme bears a rational

relationship to legitimate legislative goals. This Court has already detailed the legitimate reasons set forth by the City in establishing the Ordinances. These reasons bear a rational relationship to the scheme.

With regard to the "expressive activities involving the use of structures," the Court noted this section of the Ordinance regulates the structures, not the speech itself. LBMC § 18.28.010.

C. Retaliation, Harassment, and Defamation

Plaintiff does not contest his claims for retaliation, harassment, and defamation are barred by the statute of limitations.

D. The ticket

In his moving papers, Plaintiff makes an allusion to the issuance of the ticket itself being a violation of his constitutional rights. At oral argument, counsel reasserted this theory, contending a separate claim exists on this basis even if the questioned ordinances are constitutional.

Under the present state of the pleading and briefing, the Court is unable to make a summary judgment ruling on this point. It appears to the Court that Plaintiff's complaint is based throughout on the premise that the subject code sections are unconstitutional. It is very difficult for the Court to now separate out Plaintiff's contentions to conclude what Plaintiff's allegations about the ticket would be if the code sections are constitutional.

On its own motion, the Court directs Plaintiff to file an amended complaint within 20 days, omitting the assertion of unconstitutionality (which has already been decided by the Court[3]) and alleging as clearly as possible his contentions how the issuance of the ticket violated his constitutional rights.

DATED: May 11, 2001

/s/ _____
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

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[3] By omitting the allegation of unconstitutionality, the Court does not deem Plaintiff to have waived those contentions, should he choose to appeal the Court's ruling.

APPENDIX G

CITY OF LAGUNA BEACH

ORDINANCE
CHAPTER 18.28

USE OF PARKS

Sections:

18.28.010	**General use.**
18.28.015	**Main Beach Park.**
18.28.020	**Outdoor athletic contests.**
18.28.030	**Informal weddings.**
18.28.040	**Commercial filming.**
18.28.050	**Outdoor gatherings, concerts, festivals, art shows and exhibitions.**
18.28.060	**Independence Day celebration.**
18.28.070	**Amplified sound.**
18.28.080	**Administration.**
18.28.090	**Park curfew hours.**

18.28.010 General use.

Unless otherwise reserved pursuant to this chapter, city parks are available to the public for general active and passive recreational use in accordance with the design and character of the area being used. No reservations shall be taken for general use of parks. Except as expressly authorized otherwise in this chapter, parks are to be used only with the structures, equipment and other facilities provided by the city. No additional tables, booths, tents or structures may be

erected or installed for general use activities. (Ord. 1307 § 1, 1995: Ord. 1107 § 2 (part), 1986).

18.28.015 Main Beach Park.

(a) In accordance with the provisions of Section 18.28.010, the hard surface cobblestone area located in the southerly portion of Main Beach Park shall be available not more than five days per month on a first-come first-served basis by reservation through the city for the conduct of constitutionally protected expressive activities involving the use of structures. Such activities, which shall be sponsored by an individual or organization, may be conducted by the same individual or organization on not more than two days in any consecutive six-month period.

(b) In accordance with the provisions of Section 18.28.010, the hard surface cobblestone area located in the southerly portion of Main Beach Park shall be available not more than two days per month on a first-come first-served basis by reservation through the city for the conduct of art and craft shows. Such activities, which shall be sponsored by a nonprofit organization, may be conducted by the same organization on not more than six days in any calendar year. All arts and crafts on display must have been made by the exhibitor, and all exhibitors must be residents of the city. Each exhibitor must have a Laguna Beach business license and shall display his or her state resale number.

(c) The planning of such activities and location of such structures as are authorized in subsections (a) and (b) of this section shall comply with all applicable public health and safety requirements and shall be coordinated with the city so that the activity is carried on in a manner which will minimize

to the greatest practical extent disruption and disturbance of ordinary and normal public usage of Main Beach Park for active and passive recreational and aesthetic enjoyment. No single structure in excess of six hundred square feet in area or in excess of eight feet in height shall be allowed.

(d) The sponsors of such activities as are authorized in subsections (a) and (b) of this section shall be required to obtain a standard policy of liability insurance naming the city as an additional insured, in the amount established by the city council therefor, with respect to any liability, loss, damage or injury incurred by the city, or by any other person and claimed against the city, proximately caused or arising out of the proposed activity and/or use of structure.

(e) The sponsors of such activities as are authorized in subsections (a) and (b) of this section shall be responsible to monitor the area in which the activity is being conducted, to collect and dispose of all litter generated in connection with the activity, to remove all structures used in connection with the activity upon its conclusion, and to otherwise restore the area used to its pre-existing condition. (Ord. 1325 § 1, 1997: Ord. 1307 § 2, 1995: Ord. 1128 § 1, 1987).

18.28.020 Outdoor athletic contests.

Parks may be reserved through the city for athletic contests, events or activities in areas designated for such use. Practice or training sessions may also be approved under this section. Special structures to be used in conjunction with these activities shall be subject to the discretionary review and approval by the city. The intent of this section is to provide for the integrity of various community sports leagues and sports events by facilitating the harmonious scheduling of

their activities. Parks may be used for outdoor athletic contests under the provisions of Section 18.28.010 as well where no special structures are involved. (Ord. 1107 § 2 (part), 1986).

18.28.030 Informal weddings.

Certain areas designated for informal weddings may be reserved through the city on a first-come-first-served basis, upon payment of a nonrefundable fee to be established by resolution. No additional tables or chairs or other facilities may be erected for such ceremonies. No alcoholic beverages shall be served and no amplified sound shall be permitted. The maximum number of the wedding party and guests shall not exceed fifty people in the Gazebo at Heisler Park or at Crescent Bay Park. Up to ninety-five people are allowed per wedding in other locations in Heisler Park. No more than two weddings per day shall be permitted at Crescent Bay Park. (Ord. 1107 § 2 (part), 1986).

18.28.040 Commercial filming.

Areas of parks may be reserved for commercial filming in accordance with Chapter 5.66 of this code. (Ord. 1107 § 2 (part), 1986).

18.28.050 Outdoor gatherings, concerts, festivals, art shows and exhibitions.

Any outdoor gathering, concert, festival, art show or exhibitions not otherwise provided for in this chapter shall be held at Irvine Bowl Park. The use of the amphitheater and festival grounds at Irvine Bowl shall be on a first-come-first-served basis by reservation through the city and is subject to the requirements of any existing or subsequently approved lease of those facilities. Nothing in this chapter shall be

construed to supersede the provisions of any such lease. Outdoor gatherings to be attended by more than twenty-five hundred persons require a license pursuant to Chapter 5.68 of this code. (Ord. 1107 § 2 (part), 1986).

18.28.060 Independence Day celebration.

The city council finds and declares that, in consideration of the city-wide ban on the use of fireworks, it is in the interest of public health, safety and general welfare to permit and conduct a public fireworks display at Main Beach on or about July 4th of each year to celebrate Independence Day. (Ord. 1107 § 2 (part), 1986).

18.28.070 Amplified sound.

The use or operation of any sound amplification equipment in such a manner that sound is projected into any public park shall be subject to the provisions of Chapter 5.40 of this code. (Ord. 1107 § 2 (part), 1986).

18.28.080 Administration.

The city manager or his/her designee shall be responsible for the administration of this chapter and shall develop application forms and any further rules and regulations deemed necessary to administer it. Reasonable application fees and use fees not otherwise provided by the Municipal Code, city council resolution or other agreements that may be approved by the city council from time to time may be set to cover the costs of use and administration. Maintenance efforts and other contributions may be accepted in lieu of such fees. Any determination by the city manager or his/her designee may be appealed to the city council pursuant to Chapter 2.02 of this code. (Ord. 1107 § 2 (part), 1986).

18.28.090 Park curfew hours.

It is unlawful for any person to be within the area known as Crescent Bay Point Park between the hours of twelve midnight and five a.m. of the following day. (Ord. 1313 § 1, 1996).